DOCUMENT RESUME

ED 344 301 EA 023 867

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TITLE Student Dress Codes in the 1990s.
PUB DATE Jan 91
NOTE 9p.
PUB TYPE Reports - Descriptive (141) -- Viewpoints (Opinion/Position Papers, Essays, etc.) (120) -- Journal Articles (080)
JOURNAL CIT Inquiry & Analysis; p1-7 Jan 1991

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Board of Education Policy; *Court Litigation; *Dress Codes; Elementary Secondary Education; Federal Courts; Public Schools; Student Rights; Student School Relationship
IDENTIFIERS *Hair; Supreme Court; *Uniforms

ABSTRACT

In 1969 the Supreme Court, in "Tinker v. Des Moines Independent Community School District," established the right of students to freedom of expression in school unless the exercise of that right would materially and substantially interfere with the requirements of appropriate discipline or collide with the rights of others in the school. Two decades after "Tinker" there is now a nationwide trend to adopt stricter dress and grooming codes. In some public schools, even uniforms are being worn. This article examines the evolving legal status of student dress and grooming codes from the judicial confusion of the early 1970s to the increasingly deferential attitude of the courts to school officials in more recent years. School districts choosing to implement a uniform policy will be more likely to gain success if parents are involved in the decision-making and if the program is voluntary. (71 footnotes) (MLF)

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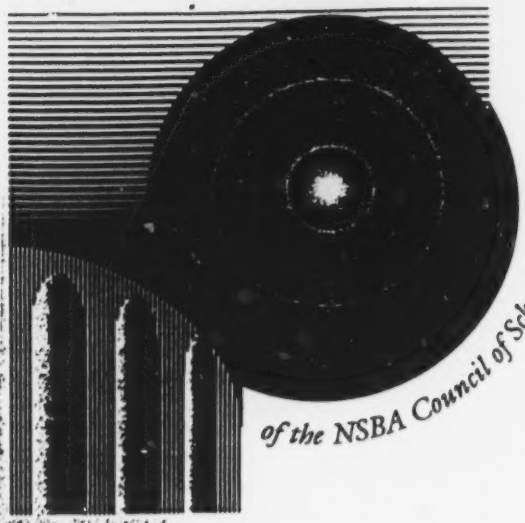

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Introduction

"The times, they are a changin'," sang Bob Dylan, about a time of anti-war protest when the credo of the day was, "Question Authority," the garb was long hair and Levi's, and the power of students on American campuses was at its apex. The time was also marked by significant change in the public schools. Historically, school officials were viewed as acting in *loco parentis* in their management and discipline of student behavior and appearance. In 1969 the Supreme Court reaffirmed in *Tinker v. Des Moines Independent Community School District*,[1] that school officials are "state" actors whose discipline of students is constrained by the federal constitution. *Tinker* established the right of students to freedom of expression in school unless the exercise of that right would materially and substantially interfere with the requirements of appropriate discipline or collide with the rights of others in the school.[2]

In a dissent in *Tinker*, Justice Black warned against the consequences of inserting the judiciary into decisions of student discipline: "[I]f the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."[3]

In fact, in the years after *Tinker*, the courts were inundated with matters of student discipline—particularly concerning student grooming. By one author's count, 150 reported cases involved student hair regulations by mid-1974.[4] The federal circuit courts were nearly divided in their hair length decisions. The Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits generally upheld the authority of school officials to impose reasonable grooming requirements; the First, Fourth, Seventh, and Eighth Circuits held to the contrary that hair length regulations were unconstitutional. The Supreme Court was given the chance to resolve the issue no fewer than nine times but each time declined. One commentator, summarizing this legal debate, aptly observed: "Perhaps no issue has generated more heat and less light in the area of student conduct than the issue of a student's personal appearance and clothing."[5]

Two decades after *Tinker*, it appears the times are changing again. There is now a nationwide trend to adopt stricter dress and grooming codes. In some public schools, even uniforms are being worn. School officials give various reasons for this change. Many believe stricter dress requirements set a tone that has been missing in some schools in recent years, one of respect and seriousness of purpose. Others, often with parent and student support, argue that students have grown so fashion conscious that they are distracted from their studies and that the popular clothing has become so expensive that their families are

*The author acknowledges the research assistance of Jonathan Blumberg, an associate at Tharrington, Smith & Hargrove.

1. 393 U.S. 503 (1969).
2. *Id.* at 513.
3. *Id.* at 518.
4. L. Bartlett, "Hair and Dress Code Revisited, 33 Educ. L. Rpt. 7, 8 (citing E. Reutter, *The Courts and Student Conduct*, N.O.L.P.E. 42 (1975)).
5. J. Rapp, 2 *Education Law* § 9.02[8][a], at 9-24 (1990).

EA 023 867

INQUIRY & ANALYSIS is a bi-monthly publication of the NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, Virginia 22314. Donald B. Sweeney, Jr., Council Chairman; Martha A. Fricke, NSBA President; Thomas A. Shannon, NSBA Executive Director; August W. Steinhilber, Associate Executive Director and General Counsel; Gwendolyn H. Gregory, Deputy General Counsel; Susan R. Butler, Director, Administration; Jennifer Williamson, Manager, Legal Services; Naomi E. Gittins, Staff Attorney and Editor; and Albertina Bailey, Paralegal. *I&A* is a membership service of the Council or can be purchased by subscription for $60/6 issues. Copyright © 1991 by the National School Boards Association. All Rights Reserved.

being economically squeezed by peer pressure. Still others are adopting policies that aim at specific evils, such as gang membership and student drug involvement, by prohibiting the wearing of certain attire or insignia that identify gang members.

The social and political climate has certainly grown more conservative since the 1960s. Has the legal climate also followed that trend? Will the courts be more willing to defer to the judgments of school officials in matters of student appearance, or will there be a new round of legal challenges and conflicting decisions from the federal courts?

While there is still some room for debate, the answers to these questions are far more certain now than they once were. The right to engage in symbolic speech on matters of public concern is still protected under the rule in *Tinker*; however, a student's more general interest in expressing himself through his appearance will be accorded minimal constitutional protection. This article will examine the evolving legal status of student dress and grooming codes from the judicial confusion of the early 1970s to the increasingly deferential attitude of the courts to school officials in more recent years, and offer some suggestions to school districts considering the adoption of stricter policies.

Hair Length Regulations

The Early Decisions

Most of the reported cases challenging school regulation of student appearance have involved hair length restrictions; very few have dealt with student dress per se. As noted earlier, the circuit courts have split over the authority of the schools to dictate hair length. The courts that held for the schools often dismissed the cases, finding no constitutional right involved.[6] In one of its early hair length decisions, the Fifth Circuit quite bluntly held that a right "to wear one's hair in a public high school in the length and style that suits the wearer," simply cannot be found "within the plain meaning of the Constitution."[7]

The pro-student cases, on the other hand, found protection in several constitutional provisions, including the First, Ninth, and Fourteenth Amendments.[8] Many of these courts appeared to be influenced by the *Tinker* decision, but instead of focusing on whether the appearance in question amounted to speech, the courts looked at whether the appearance would be substantially disruptive and found it would not be. Often these courts would require the school district to show that the regulation was necessary to fulfill the school's educational purposes.[9] When the Supreme Court finally decided a case involving government regulation of hair length, it became clear that both strands of legal reasoning were flawed.

After declining to review a steady stream of student hair length cases, in 1976 the Supreme Court finally granted *certiorari* in a case involving the grooming regulations of a New York county police department.[10] Suffolk County police officers were not permitted to wear long or bushy hair, long sideburns, mustaches, or beards of any kind, except for medical reasons. The patrolmen's union filed suit to challenge the regulation. The district court granted the county's motion to dismiss, and the Second Circuit Court of Appeals reversed. The Second Circuit found that "choice of personal appearance is an ingredient of an individual's personal liberty" protected by the Fourteenth Amendment.[11] The court held that the police department must show "a genuine public need" for the regulation.[12] On remand the district court found the department's justifications amounted simply to a desire for "[u]niformity for uniformity's sake."[13] The Second Circuit summarily affirmed this decision.

In a 6 to 2 decision authored by Justice Rehnquist, the Supreme Court reversed. The Court distinguished the claimed interest in personal appearance from those "fundamental" liberties of procreation, marriage, and family life recognized as deserving significant constitutional protection. The Court then assumed, without deciding, the existence of a Fourteenth Amendment liberty interest in personal appearance, but placed the burden on the plaintiff to show that the grooming regulation was "so irrational that it may be branded 'arbitrary.'"[14]

The Court emphasized the context of the challenged regulation. This was not, the Court noted, an attempt to regulate the grooming of the citizenry at large, but a restriction placed on a public employee whose job has historically limited his freedom of choice in personal matters. A police officer must, for example, wear a very specific uniform, refrain from smoking in public, and avoid an active role in local political affairs.

The Court noted that in matters such as this, involving the dispatch of the State's "own internal affairs," broad discretion and a presumption of validity must be accorded by the courts.[15] While the district court carefully scrutinized and rejected the rationales given for the grooming regulation, the Supreme Court accepted the department's justifications without question. The Court found that the regulation could be supported either by the department's desire to make police officers readily recognizable or by "a desire for the *esprit de corps* which such similarity [in appearance] is felt to inculcate within the police force itself."[16] In the Court's opinion, the case was so clear that the district court was correct in the first instance in granting defendant's motion to dismiss.

The *Kelley* decision thus establishes a method for analyzing personal appearance cases. At most, a person has a basic liberty interest in his personal appearance that cannot be infringed without some showing of a rational basis related to a legitimate governmental interest. Courts must consider the context of the regulation in determining the level of deference to be granted the government decision-maker. However, in matters involving traditional state prerogatives, the courts are instructed to afford the government "wide latitude."[17]

Under the *Kelley* reasoning, a strong argument can be made that the local education officials' regulation of students' personal appearance at school should be afforded substantial deference. Like police officers, students are subject to numerous restrictions on their personal freedoms as an inherent part of the educational process. They must adhere to a general code of

6. *See, e.g., Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970); *King v. Saddleback Junior College Dist.*, 445 F.2d 932 (9th Cir. 1971).
7. *Karr v. Schmidt*, 460 F.2d 609, 613 (5th Cir. 1972).
8. *See, e.g., Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969).
9. *See, e.g., Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972).
10. *Kelley v. Johnson*, 425 U.S. 238 (1976).
11. *Dunn v. Barry*, 483 F.2d 1126, 1130 (2d Cir. 1973).
12. *Id.* at 1131.
13. *Kelley*, 425 U.S. at 243.
14. *Id.* at 248 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955)).
15. *Id.* at 247 (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961)).
16. *Id.* at 248.
17. *Id.* at 247.

conduct, take required classes, attend school regularly, and only leave campus when they are allowed. In addition, like the administration of the police force, the responsibility and authority over the education of children is a quintessential state function. And finally, as the Supreme Court has often acknowledged, "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[18]

There is one obvious difference between the student cases and the facts in *Kelley*, however. *Kelley* involves an employee who is free to seek other employment if he does not like the conditions of his job. Students, on the other hand, are generally required to attend school, and for most, the public school is their only option. It is doubtful that the present Supreme Court would view this difference as controlling; however, it has allowed the dichotomy in the hair length case law to stay alive.

Hair Length Regulations after Kelley

The circuit court decisions that relied on an application of the free speech protection of the First Amendment,[19] or the "penumbras" of the Ninth Amendment,[20] or a perceived fundamental right[21] in one's personal appearance as grounds for rejecting school hair length regulations are clearly wrong under *Kelley*. Likewise, requirements that school systems show a necessity for imposing grooming restrictions are also highly suspect. Despite the rather strong statement of the Supreme Court in *Kelley*, however, many of the circuits that once overturned school hair length regulations appear ready to do so again.

In the Eighth Circuit's 1971 decision striking down a school hair policy, *Bishop v. Colaw*, the court concluded that "the freedom to govern one's personal appearance ... ranks high on the spectrum of our societal values. ..."[22] The court held that the school system carried the burden of establishing the necessity of infringing upon this freedom in order to satisfy the school's educational mission.[23] The court found the school system's avowed concerns about disruption and distraction as well as hygiene and safety to be totally unpersuasive and little more than a pretext for imposing the style preferences of the older generation on the younger.

In 1983, the Eighth Circuit revisited the issue of hair length in a case involving a park naturalist.[24] While relying heavily, if reluctantly,[25] on the Supreme Court's decision in *Kelley* to hold in favor of the employer, the court also cited its own decision in *Bishop* as good law.[26] In doing so, the court implied that it would still impose the stricter rule of "necessity" in student hair length cases.

The Seventh Circuit has been the most persistent in rejecting hair and grooming regulations for students. In one of its earlier cases, *Breen v. Kahl*,[27] the court described the right to wear one's hair at any length or in any manner as "fundamental," possibly deriving from the First Amendment or encompassed within the Ninth Amendment. Whatever the source, the court held that "[t]o limit or curtail this or any other fundamental right, the state has a 'substantial burden of justification.'"[28]

In 1974, the court upheld the dismissal of a teacher who wore a beard and sideburns contrary to school rules, and in an apparent divergence from *Breen*, held that the right to appear as one chooses is of much lesser magnitude than a "fixed star in our constitutional constellation."[29] However, the court quickly distinguished student hair cases from the public employment context, determining that "the availability of a teaching position in one school district is less serious ... than the deprivation of an opportunity to obtain an education."[30] As if to underscore this point, that same year the court again invalidated a student grooming code, applying the *Breen* "fundamental rights" and substantial burden analysis in the school setting.[31]

The Seventh Circuit reviewed employee grooming regulations in the school context once again in the post-*Kelley* case, *Pence v. Rosenquist*.[32] In this case, a teacher who also drove a school bus was suspended from his driving duties because he refused to shave his mustache. No action was taken against him in his capacity as a teacher for sporting the facial hair. As the basis for their action, the school system cited a state department of education regulation that bus drivers must have a "neat and clean appearance."

In considering Pence's plight, the Seventh Circuit was forced to grapple with its earlier decision in which it had held that an employee's interest in choice of personal appearance did not raise a constitutional issue. The court rejected its previous reasoning and adopted "the proposition only assumed in *Kelley*"[33] and repeatedly applied in its student hair cases "that choice of appearance is an element of liberty."[34] The court then applied the Supreme Court's standard in *Kelley* and found that the school system's action was indeed irrational and arbitrary. The fact that the no-mustache policy did not apply to teachers was cited by the court as one indication of the policy's unreasonableness. In addition, the court cited evidence of a letter from the Illinois Office of Education stating that the state regulation was never intended to prohibit mustaches or beards and that in their opinion there was "no relationship whatever between the wearing of a beard or mustache and the ability to drive a bus."[35]

For the circuits that had upheld student grooming requirements, *Kelley* offered additional fuel and a clearer constitutional rationale. In 1982, the Fifth Circuit, perhaps the most prolific on the subject of student hair, considered a challenge to a school district's decision to apply its student no-

18. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).
19. *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969).
20. *Id.*
21. *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972); *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971).
22. *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971).
23. *Id.*
24. *Lowman v. Davies*, 704 F.2d 1044 (8th Cir. 1983).
25. *Id.* at 1046 n. 3 (In a footnote the court noted that the plaintiff was an exemplary employee and encouraged the parties to settle the matter rather than pursue it on remand.)
26. *Id.* at 1045.
27. 419 F.2d 1034 (7th Cir. 1969).
28. *Id.* at 1036 (citing *Griswold v. Connecticut*, 381 U.S. 479, 505 (1965)).
29. *Miller v. School Dist. No. 167*, 495 F.2d 658, 664 (7th Cir. 1974).
30. *Id.* at 665.
31. *Holsapple v. Woods*, 500 F.2d 49, 52 (7th Cir. 1974).
32. 573 F.2d 395 (7th Cir. 1978).
33. *Id.* at 400.
34. *Id.* at 399.
35. *Id.* at 397 n. 2.

beard policy to all employees in the school system.[36] The court began with a lament that the hair issue had been resurrected. In its last hairstyle case in 1975, the court expressed the hope that "the public, with growing thousands of entirely responsible adult members of the community wearing all sorts of hair and face trims, has come to its senses and does not see in such variations the seeds of violence and revolution."[37]

The Fifth Circuit overturned the district court's dismissal, finding under *Kelley* that a cognizable liberty interest was involved. But in spite of its apparent philosophical acceptance of hair lengths, long and short, the court upheld the school board's action. The court held that "[i]n the high school environment, a hairstyle regulation is a reasonable means of furthering the school board's undeniable interest in teaching hygiene, instilling discipline, asserting authority, and compelling uniformity," all legitimate concerns of the school board in the court's view.[38] The court also reaffirmed its "bright line" test announced in earlier decisions that hairstyle regulations in the public elementary and secondary schools are presumed to be justified by the school's needs while similar regulations at the college level are presumed invalid.[39] The court explained that this distinction rests on the difference in the college and high school environments, not on the difference between adults and adolescents. Thus, by upholding the school board's application of the student no-beard policy to all employees, the Fifth Circuit ruled that a school board may freely regulate the appearance of employees in the same manner as it restricts students.

Two additional cases concerning the hairstyles of athletes have been considered by courts in the "pro-regulation" circuits. In 1984, the Eleventh Circuit upheld a coach's "clean shaven" policy for football and basketball team members.[40] Relying on Fifth Circuit precedent,[41] the court upheld the trial court's reasoning that the policy was "'adopted to accomplish the legitimate objective of presenting the school in the light deemed most favorable to the school by the students and coaches at the school.'"[42]

In a virtually identical case, a Louisiana state court upheld the clean shaven rule of a high school football coach.[43] The coach explained that the grooming rule was part of a "total discipline program" designed to encourage academic and athletic excellence. Citing evidence that the coach's program had been successful, the court held that the rule was reasonably related to a valid educational goal.

Summary

To the extent that the circuit courts diverge in their hair length opinions, the difference appears more philosophical than legal. The pro-regulation circuits view the debate as one more properly waged in the school board offices than in the federal courts. They are thus inclined, as was the Supreme Court in *Kelley*, to grant substantial deference to the judgments of school officials concerning the appropriate length and style of student hair.

The circuits that have held for the students seem to believe that school officials are imposing unnecessary norms. They are also concerned that hair length, unlike clothing, cannot be changed at the end of the school day. In these circuits, any attempts to restrict student hair lengths are likely to face an uphill, if not losing, battle. In the light of *Kelley*, however, it may be possible to impose specific grooming standards for involvement in voluntary activities such as school sponsored student clubs, particularly where the activity involves public performance. Under these circumstances, the student's status would be even more similar to that of the public employee. Also it seems likely that even these circuits would accept grooming restrictions that only affect students while they are at school, such as rules against wearing hats, spikes, or curlers.[44]

Dress Regulations

First Amendment Issues

In *Tinker*,[45] *supra*, the Supreme Court stated most emphatically that "students are entitled to freedom of expression of their views," in the absence of constitutionally valid reasons to regulate their speech.[46] The Court also established a relatively strict standard of review, requiring a showing of material and substantial disruption to justify government restriction of such speech. The Supreme Court's later decision in *Kelley* makes it clear that there is no First Amendment interest in one's personal appearance. Under *Kelley*, the school system must only satisfy a rational basis test to justify restrictions on student appearance in general.

On the spectrum from *Tinker* to *Kelley*, what standard applies to types or aspects of dress that have some communicative purpose, such as T-shirts emblazoned with commercial slogans, dress that is associated with membership in a group, or attire that is intended to announce one's individuality? A careful reading of *Tinker* and subsequent First Amendment decisions of the Supreme Court offers some guidance.

Throughout the *Tinker* decision, the Supreme Court described the students as being restricted in expressing their "particular opinion" regarding the Vietnam War.[47] Since *Tinker*, the Supreme Court has rendered at least three decisions that underscore the importance of the nature of the student's speech. The first of these cases was *Spence v. Washington*,[48] a flag desecration case decided in 1974. In *Spence*, the defendant placed tape in the shape of a peace symbol on an American flag and hung the flag upside down from his window in protest of the Cambodian incursion and the Kent State shootings. He was prosecuted under the Washington State statute prohibiting the "improper use" of the flag. Spence claimed the statute was

36. *Domico v. Rapides Parish School Bd.*, 675 F.2d 100 (5th Cir. 1982).

37. *Id.* at 101 (citing *Hander v. San Jacinto Junior College*, 519 F.2d 273, 281-82 (5th Cir. 1975)).

38. *Id.* at 102.

39. *Id.*

40. *Davenport v. Randolph Co. Bd. of Educ.*, 730 F.2d 1395 (11th Cir. 1984). *But cf., Long v. Zopp*, 476 F.2d 180 (4th Cir. 1973) (court strikes down out-of-season application of team hair length rule).

41. The Eleventh Circuit, in *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

42. *Davenport*, 730 F.2d at 1397.

43. *Humphries v. Lincoln Parish School Bd.*, 467 So.2d 870 (La. App. 2 Cir. 1985).

44. A recent rendition of the Inglewood [California] United School District student conduct code specifically prohibits wearing "hair nets, curlers and loose slippers to school," apparently reflecting the style of the day.

45. *Tinker*, 393 U.S. 503 (1969).

46. *Id.* at 511.

47. *Id.*

48. 418 U.S. 406 (1974).

unconstitutional as applied for infringing his freedom of expression. The Supreme Court agreed that Spence's conduct was speech deserving protection under the First Amendment, stating: "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[49] In the Court's view, this was "the expression of an idea through activity."[50]

The next case of interest is *Connick v. Myers*,[51] an oft-cited decision arising in the public employment context. In *Connick*, an assistant district attorney was discharged for insubordination after distributing a questionnaire soliciting her fellow employees' views on office morale, the competence of their supervisors and whether they felt pressured to work on political campaigns. The Supreme Court upheld Myers' discharge, finding that her First Amendment rights had not been violated since the content of her offending speech did not involve a matter of public concern.

In its lengthy opinion in *Connick*, the Supreme Court examined the nature and extent of a public employee's First Amendment rights and concluded: "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[52] In a concluding note, the Supreme Court offered a more general statement about the purpose of the First Amendment, "that the First Amendment's primary aim is the full protection of speech upon issues of public concern ...."[53]

Finally, the Supreme Court's recent decision in *Bethel School District No. 403 v. Fraser*,[54] focuses directly on the expressive rights of public school students. In *Bethel*, the Supreme Court upheld disciplining a student for delivering a sexually explicit campaign speech at a school assembly. The Court emphasized the difference between the political message of Tinker's armband and the sexual context of Fraser's speech. While acknowledging that the fundamentals of a democratic society require tolerance of divergent political and religious views, the Court stressed the role of public education in inculcating "the habits and manners of civility" that include taking into account the "sensibilities of others."[55] The Court held that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," and the determination of what "manner of speech" is inappropriate in school "properly rests with the school board."[56]

Reading *Spence*, *Connick*, and *Bethel* together, it can readily be argued that the more rigorous *Tinker* standard should only be applied to student speech and expressive conduct on matters of public concern when the student is conveying a particularized message that is understandable to those who view it. Where a student's appearance, either through symbol or print, conveys only a generalized message, such as expressing one's individuality or group membership, or if the message or depiction is vulgar, offensive or lewd, the "speech" should not be considered a fundamental interest deserving the heightened protection of the First Amendment. Rather, attempts restricting such expression by school officials should be governed by the *Kelley* rationality standard as applied in *Bethel*.

This analysis has been used in two recent federal district court cases involving student dress restrictions. In the first case, the court upheld a dress code that prohibited the wearing of earrings by male students.[57] The school board had adopted a general policy banning the wearing or display of any gang symbol. When the school administration determined that many of the male students wore earrings to demonstrate their gang affiliation, the practice was prohibited. The plaintiff contended that he wore the earring to express his individuality, not to denote gang membership and that his expression was protected by the First Amendment. He also claimed an equal protection violation because only boys, not girls, were prevented from wearing earrings.

The court rejected both arguments. Applying *Spence*, the court held that the "message" of individuality is not a particularized message within the protection of the First Amendment. The court then applied the rationality test of *Kelley* and found the dress code a reasonable means of addressing the board's legitimate interest in curtailing gang activity. As for the student's equal protection argument, the court found no gender-based discrimination. The policy was aimed at discouraging gang membership and girls did not wear earrings to symbolize gang affiliation.

In the second case, the district court denied a preliminary injunction to a high school student who sought to wear a T-shirt depicting school administrators holding alcoholic beverages.[58] The court held that the T-shirt failed to convey any particular message. It further agreed with the school administrators that the T-shirt was clearly offensive because it suggested the administrators were intoxicated. The court held that the case fell squarely within the precedent of the Supreme Court's decision in *Bethel*. The district court concluded that, as in *Bethel*, the authority of the school officials "would be severely compromised if this T-shirt was circulated among the students."[59] The court also noted that the schools had a statutory obligation to teach about the effects of alcohol, and their disciplining students for wearing the offending T-shirt fulfilled that duty.

One other court has recently applied the reasoning in *Bethel* to uphold school dress regulations that required students to "dress in conformity with the accepted standards of the community."[60] In this case, a brother and sister were prevented from attending the school prom because they were dressed in clothing of the opposite sex. The district court made short shrift of the students' claims of First Amendment and Due Process Clause violations. It held that the school regulations were reasonably related to the "valid educational purposes of teaching community values and maintaining school discipline."[61]

49. *Id.* at 410-11.
50. *Id.*
51. 461 U.S. 138 (1983).
52. *Id.* at 146.
53. *Id.* at 154. See also, *East Hartford Educ. Ass'n v. Bd. of Educ. of Town of East Hartford*, 562 F.2d 838, 858 (2d Cir. 1977).
54. 478 U.S. 675 (1986).
55. *Id.* at 681.
56. *Id.* at 683.
57. *Olesen v. Bd. of Educ. of School Dist. No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987).
58. *Gano v. School Dist. No. 411*, 674 F. Supp. 796 (D. Idaho 1987).
59. *Id.* at 798.
60. *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1356 (S.D. Ohio 1987).
61. *Id.* at 1355.

Uniforms in Public Schools

Public schools across the country are experimenting with the ultimate dress code: students wearing uniforms. While uniforms are an old tradition in private schools in this country and public schools abroad, the use of uniforms by public school children is novel and, so far, legally untested. Requiring students to wear uniforms is bound to raise some eyebrows. After all, it is virtually a total denial of the liberty interest in one's personal appearance. Yet, under *Kelley* the school system must only show a rational reason for adopting even this most restrictive dress code.

Testimonials from school officials that have introduced uniforms offer numerous justifications for their use. Increasing students' self-esteem, school pride and attention to school work are the reasons given most often. The principal of one elementary school in an economically depressed neighborhood of Baltimore offered this observation of its voluntary uniform policy: "I think I can truthfully say the school climate has been enhance. ... Teachers tell me students are more positive in their attitudes toward their work [now that they are] dressed for success."[62]

Courts have upheld specific restrictions on the dress of students; will they support policies that dictate what students *shall* wear? At least one court has upheld a mandatory dress code for teachers based on the rationale of *Kelley*. In 1977, the Second Circuit, on a rehearing *en banc*, considered a public school teacher's challenge to the school system requirement that he wear a necktie while teaching an English class.[63] In explaining its willingness to rehear the case, the court explained that it raised "important issues concerning the scope of judicial oversight of local affairs."[64]

The teacher claimed that his refusal to wear a tie constituted symbolic speech under the First Amendment because his conduct was intended to convey to his students his opposition to "establishment conformity" and his association with the views and values of the students' generation.[65] The Second Circuit rejected this argument, describing the teacher's claim of symbolic speech as "vague and unfocused" and his message more akin to unprotected conduct.[66] The court endorsed the school board's legitimate concern for "promoting respect for authority and traditional values, as well as discipline in the classroom, by requiring teachers to dress in a professional manner."[67] The court concluded that the teacher had failed to meet his burden under *Kelley* of showing the dress code was so irrational as to be arbitrary.

The reasoning of the Second Circuit should apply with full force to mandatory dress requirements for students. The stated reasons for requiring the faculty dress code are some of the same ones now given to justify student uniforms: increasing respect for authority, improving discipline in the classroom. As described earlier, the Fifth Circuit has upheld the extension of student grooming regulations to all school employees.[68] There seems little jurisprudential reason that the rules could not extend in the reverse, from faculty to students. Again, the one major distinction that could be drawn is the same one raised in the hair cases: the employee has taken the job voluntarily and may seek other employment; the student is compelled to attend school and public school may be his only choice.

Indeed, like the hair length debate of old, judicial opinions on the appropriateness of requiring uniforms may vary. Those circuits that rejected school hair length policies in the past may also be hostile to the school uniform policies of today. These courts are more likely to engage in an active balancing of the student's liberty interest against the school system's educational concerns. They may scrutinize the school system's reasoning more carefully and require some factual showing that uniforms actually do improve the learning environment. Like the district court in *Kelley*, these circuits may dismiss the schools' rationales as nothing more than seeking "uniformity for uniformity's sake" unless a strong showing can be made.

On the other hand, the circuit courts that have historically allowed school officials to make the rules on student dress and grooming without judicial intervention are also likely to defer to the educators' judgments on this matter of internal affairs. In all probability, these courts would permit the current experiments with student uniforms to continue.

Summary

The boundaries on the authority of school officials to adopt stricter dress codes is now relatively clear. Student attire that conveys a message on a matter of public concern is considered symbolic speech deserving the full protection of the *Tinker* material and substantial disruption standard. Vulgar, indecent, obscene or insulting dress need not be tolerated. In addition, dress that carries a message that promotes or encourages behavior contrary to valid pedagogical purposes, such as smoking, drinking, drug use or physical or sexual violence, may be prohibited under *Bethel*. Finally, mere expressions of individuality or affiliation may be restricted if there is some reasonable basis for doing so.

If a school district chooses to implement a uniform policy, these efforts should be permitted where school officials can articulate a valid educational purpose for their actions. By all accounts, the use of uniforms has been most successful where school officials have solicited active parent involvement in the decision-making. It seems that most often uniforms are being introduced in the elementary grades, perhaps because this is the path of least resistance, where the students are less likely to demand to "express themselves" through clothing; or because it is the best place to inculcate positive values and attitudes about school. One final ingredient that seems to have contributed to the success of some school uniform programs is voluntariness. Even without requiring that uniforms be worn, some schools have achieved better than a 90 percent compliance rate due to general community support.[69]

Conclusion

The problems faced by school officials and students have grown noticeably worse in the past twenty years. Reports of the

62. NATION'S SCHOOL REPORT, Capitol Publications, Inc., Vol. 14, No. 22, at 2 (1988).
63. *East Hartford Educ. Ass'n v. Bd. of Educ. of Town of East Hartford*, 562 F.2d 838 (2d Cir. 1977).
64. *Id.* at 856.
65. *Id.* at 857.
66. *Id.* at 858.
67. *Id.* at 859.
68. *Domico*, 675 F.2d 100 (5th Cir. 1982).
69. S. Howell, *Back to Basics: Uniforms in Vogue*, Alabama School Boards, at 2 (July 1990).

crisis in public education are legion. Student attendance and dropout rates are alarming, to say nothing about the presence of drugs, weapons and violence in some schools. It is little wonder that school boards are looking for ways to restore order and improve the academic focus.

Reflecting on the movement to stricter dress codes, a spokeswoman for the American Civil Liberties Union observed: "It's really a desperate reaction on the part of school officials frustrated with the lack of solutions to their problems."[70] The ACLU official is probably correct—public school educators are looking for solutions and, to some, these solutions may seem uninspired or overbearing. The policy issues regarding student dress and grooming are not simple. Stricter dress codes will, no doubt, have salutary effects for some schools and some school districts. On the other hand, there is a risk that unnecessarily strict dress codes will simply engender cynicism and controversy and divert energies away from education. Nonetheless, the trend in the courts, supported by Supreme Court precedent, is to leave these policy decisions to the educators.

In describing the delicate balance that must be struck between the role of the courts and the schools in matters of student expression, Judge Godbold of the Fifth Circuit, in one of the early hair length cases, may have said it best:

> A school may not stifle dissent because the subject matter is out of favor. Free expression is itself a vital part of the educational process. But in measuring the appropriateness and reasonableness of school regulations against the constitutional protections of the First and Fourteenth Amendments the courts must give full credence to the role and purposes of the schools and of the tools with which it is expected that they deal with their problems, and careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner.[71]

In the final analysis, the challenge for school officials is to develop dress codes that are responsive to the needs of their school communities without being unnecessarily restrictive. The challenge for the courts is to allow school officials to exercise their best judgments about how to educate our young, even when the courts may disagree as to the wisdom of these efforts.

70. **Jennings, *Stricter Rules on Student Dress, Decorum Revive Familiar Civil-Liberties Questions*, Education Week, October 18, 1989, at 14.**

71. ***Ferrell v. Dallas Ind. Sch. Dist.*, 392 F.2d 697, 704-05 (5th Cir. 1968).**